

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 53 OF 2006.

1. Marcus D'Souza.

2. Mrs. Ana Maria Carmelina Mercia
alias Annie D'Souza,
both major in age, Indian Nationals,
r/o House No. 257, Padri Waddo,
Gauvoim, Tivim, Bardez, Goa. Appellants

Versus

Mrs. Bazilia Vere Diana Ana Maria
Eufemia Rodrigues alias Diana B.
Rodrigues, alias Vere Diana Bazilia
Rodrigues, Major,
Indian National, Housewife,
R/o House No. 241, Padri Waddo,
Gauvoim, Tivim, Bardez, Goa. Respondent.

Mrs. A. Agni, Advocate for the Appellants.

Mr. S.G. Dessai, Senior Advocate with Mr. Shivan Dessai, Advocate for the Respondent.

CORAM: P. V. KAKADE, J.

DATE: 31st August, 2006.

ORAL JUDGMENT:

Heard the learned counsel for both the parties. Rule. Rule made returnable forthwith.

2. The unsuccessful defendants have preferred this appeal against the Order of the Civil Judge Junior Division, Bicholim, allowing the

temporary injunction application filed by the respondent/plaintiff and restraining the appellants/defendants from interfering in the suit property in any manner whatsoever.

3. The respondent/plaintiff filed the suit alleging that she was the owner in possession of the suit property bearing Survey No. 302/22 of village Gauvoim, Tivim and the suit property is adjacent to the property of Survey No. 302/21 wherein defendants' residential house is located. It was alleged that with ulterior motive the defendants tried to interfere with the suit property by destroying the cultivation and committed theft of stones and parking vehicles and therefore there was apprehension in the mind of the plaintiff that the defendants might dispossess her from the suit property and therefore her suit for perpetual injunction was filed. In the course of the suit, the said application for temporary injunction on similar lines came to be filed.

4. The defendants contested the claim inter alia denying the claim made by the plaintiff and submitted that they had filed earlier suit against the plaintiff bearing R.C.S. No.56/97 for access through the property of the plaintiff to come to his backyard and in his application for temporary injunction (Civil M.A. No. 176/97/B) which was dismissed by Order dated 11th August, 1998. In the earlier suit namely RCS No.56/97 the defendants

had filed an application for temporary injunction against the plaintiff which application was also granted against which an appeal was preferred before Addl. District Judge, Mapusa which appeal came to be allowed by Order dated 25th October, 2000 against which revision filed before this Court also came to be dismissed and application filed for temporary injunction by the plaintiff in that Court came to be dismissed.

5. In the course of hearing of this appeal, the learned counsel for both the parties have taken me through the history of earlier litigation between the parties in respect of the same suit property. A note is required to be taken of the fact that the present appellants have filed R.C.S. No.56/97 which is pending adjudication on merits finally though temporary injunction application filed by the present appellants claiming easementary or other right through the suit property came to be finally disposed of. On this background the present suit has been filed.

6. The respondent in her plaint has submitted that after the temporary injunction application made by the present appellants in the earlier suit came to be disposed of, recently the appellants have resumed their allegedly illegal activities in the month of July-August, 2005 which gave rise to fresh cause of action and present suit came to be filed.

7. The learned trial Judge, after hearing both the parties and on the basis of available evidence, came to the conclusion that the plaintiff has established that there was prima facie case in her favour to seek injunction. It was also held that principle of balance of convenience would tilt in favour of the plaintiff and if the injunction is refused in favour of the plaintiff, he would be put to irreparable injury as his easementary rights would be violated and as such the application came to be allowed in the present appeal.

8. At the outset, it may be noted that the learned counsel for the appellants fairly conceded in the beginning that there is no dispute whatsoever with regard to the ownership title to the suit property which is an open strip of land adjacent to his house. The case of the appellants/defendants appears to be that they have easementary right over the suit property to use the said strip of land as access to their property on the rear side of their house and therefore no injunction could be granted in favour of the plaintiff. In this regard, the only argument which was pressed into service was to the effect that after the earlier adjudication of the temporary injunction application between the parties, for nearly four to five years the appellants/defendants were using the property for access to the rear side of their property and therefore temporary injunction cannot be granted in law against them. In this

regard, I must note that there is not an iota of evidence to show that there is easementary right in favour of the appellants in respect of the suit property. On the other hand, the earlier adjudication though prima facie in nature, is proved and therefore it cannot lie in the mouth of the appellant at this stage that he has any semblance of right in his favour over the suit property.

So far as the argument with regard to the alleged use of the property for four to five years is concerned, initially it must be noted that this aspect is totally denied by the plaintiff as can be seen from the plaint itself which shows that the plaintiff has categorically alleged that the alleged illegal activities have been resumed by the present appellants in the month of July-August, 2005 and therefore in the light of this specific allegation, it was necessary for the defendant to show that he was using the property for four to five years unobstructed. Even if it is assumed for a moment that the said property was used in such manner for four to five years, still in view of the facts and circumstances prevailing on record, it cannot be said that any sort of right came to be vested in the appellants/defendants only by such use of the property.

9. The learned counsel for the appellants further urged that relief of temporary injunction is an equitable one and it was within the domain of the judicial discretion of the court to reject the application solely on the

ground that the property was in use of the appellants for long period of four to five years. In support of this submission, reliance was put on the ruling of the Madhya Pradesh High Court in the case of **National Airport Authority and others v. Vijaydutt** (AIR 1990 M.P. 326) wherein it was observed that as the relief of temporary injunction is an equitable one and is in the domain of the courts judicial discretion, the court in exercising its discretion judicially, may still refuse the relief as where there has been delay and the party applying for the relief has not come with clean hands. On perusal of the ruling relied upon, I must note that there can be no two opinions regarding the ratio laid down by the Madhya Pradesh High Court. However, it is not applicable to the present case. The element of use for four to five years is not established and therefore there is no question to record a finding that there was any delay in moving the application and suit itself.

10. The learned counsel for the respondent has put reliance on the ruling of the Apex Court in the case of **Wander Ltd. and another v. Antox India P. Ltd.** 1990 (Supp) SCC 727 wherein the Apex Court has laid down the principle to be applied by the appellate court while adjudicating the question of judicial discretion used by the lower courts as in the present case. It was observed that in appeal, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its

own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle and therefore appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

In my considered view this ratio laid down by the Supreme Court aptly fits to the present case as can be seen on going through the reasoning adopted by the lower court especially in view of the facts of the case, particularly when the ownership of the property is not in dispute.

11. In the result, I hold that the appeal is devoid of any merit and therefore the appeal stands dismissed with no order as to costs. The interim relief which was granted by this Court stands vacated.

P. V. KAKADE, J.

sl.

